

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Carriage of Digital Television Broadcast)
Signals)
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Amendments to Part 76 of the Commission's)
Rules)
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CS Docket No. 98-124

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JAN 31 2005

Federal Communications Commission
Office of Secretary

To: The Commission

REQUEST FOR DEFERRAL PENDING CONGRESSIONAL ACTION

The ABC Television Affiliates Association, CBS Television Network Affiliates Association and the NBC Television Affiliates, representing a total of some 650 stations, serving 98% of the American public, urge the Commission to defer action on digital carriage issues at this time in order to take into account the imminent changes in the broader, fundamental legislative environment that should critically affect the proper consideration of these issues. The future of the public's over-the-air television service is almost certainly at stake, the Commission should not act on the basis of a statute that is about to be fundamentally changed, and its rules will not go into effect for five years in any event.

The statute requiring the FCC to adapt its existing analog carriage rules for digital (from which this proceeding flows) imposes a requirement that 85% of American homes be digitally equipped before the analog channel give-back can take place. Two months ago Congress passed a sense of Congress resolution that a hard date for the give-back should be adopted to take the place of the 85% requirement; the resolution specified a date as early as December 31, 2006, as part of *comprehensive* digital transition legislation to be adopted this

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year. The "Ferree Plan," which this Commission presented to Congress seven months ago, also proposed, in effect, replacing the statutory 85% analog give-back with a hard date.

Under either approach, the likelihood is that only a fraction of American homes will be digitally equipped at the time broadcasters must cease analog operations. As a result of the Commission's proposed digital carriage decisions, cable systems would be required to carry at that time only broadcasters' digital signals, with no correspondent obligation to assure that all, or even most, of their subscribers will be able to access these signals. Assuming, for the sake of illustration, that the give-back date is December 31, 2009, here is a summary of the damage to the American public.

- Cable homes with only analog sets will be totally disenfranchised as a matter of law unless equipped with down-converter technology. If digital set penetration in cable homes has attained a 50% level, which is aggressively optimistic, that would mean that 45 million cable homes would have no assurance of access to over-the-air service.
- Second, third and fourth analog sets in cable homes, whether or not they have a digital set -- numbering as many as 76 million -- would also be disenfranchised.
- Another component of the carnage would be viewers who rely exclusively on over-the-air analog service -- between 20 and 30 million in all. (We realize that their disenfranchisement would not be the result of the imminent Commission's carriage decision but the damage caused by that decision would be on top of this injury which should also be taken into account.)
- If the Commission mandates true digital carriage for satellite service, probably at least half of satellite homes (those without digital sets) would lose service altogether, as would second, third and fourth analog sets in those satellite homes. If the Commission continues to permit satellite carriers to degrade broadcasters' digital signals, satellite subscribers with digital sets would not receive true digital service and those with analog sets would have no incentive to buy digital sets.

We are not aware that the Commission has focused on these destructive (unintended) consequences of its proposed digital carriage decision in the environment of a hard give-back date that the Congress supports in principle and some at the FCC also believe should

be adopted. Since the Commission's proposed digital carriage rules will not take effect until the analog give-back occurs, *there is no reason to force a decision on this issue until the national debate over a hard give-back date has run its course, particularly since Congress has signaled it will take action this year.*

The hard give-back date, multicast carriage and other carriage issues are all intertwined and should be resolved with an understanding of how all the pieces fit together. Thus, Media Bureau Chief Ken Ferree emphasized in his testimony to Congress seven months ago that multicast carriage "would give broadcasters additional incentive to return their analog licenses in a timely manner." Other elements of the Commission's decision in January 2001, including PSIP carriage, degradation protection (or lack of it) and tier requirements also severely threaten the public's free television service and are the subjects of reconsideration petitions. In addition, the scope of "program-related" is pending in the Further Notice of Proposed Rulemaking. These issues should also not be decided prematurely and on a piecemeal basis. They should be evaluated and resolved in the light of the new paradigm-shifting developments that Congress is considering. We realize that some broadcasters have urged immediate resolution of these digital carriage issues, but surely the Commission may explain to the D.C. Circuit that before reaching a decision, it should, out of prudence, first take into account the implications of a hard give-back date and other possible legislative decisions that Congress has said it will tackle this year.

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On September 9, 2004, the Commissioners adopted with obvious celebration regulations for additional children's programming on broadcasters' multicast channels. The Commission's proposed denial of protections against cable stripping of broadcast multicasting

services will render that action a virtual dead letter. How could any broadcaster launch a new children's programming service when it has no assurance that it will be accessible to 81% of its audience? Not only children's channels but also multicast channels that cover local town meetings, high school sports and other community and civic events will be aborted. The many other multicast services that broadcasters have begun to undertake, such as the predominantly local WeatherPlus Channel, launched as a joint effort by NBC and its affiliates, will be cut back or terminated.

This crippling of broadcasters' free multicast services will thwart localism -- a bedrock goal of national communications policy for over 70 years. It will force broadcasters to abandon plans to use their digital spectrum in ways they believe best serve their local communities' interests. Broadcasters will forsake and the public will forego new and imaginative services that would strengthen broadcasting at a time when its existing business model needs to adapt to a multichannel world. It seems counter-intuitive, counter-productive and contrary to the public interest that the Commission should turn dominion over this spectrum to cable operators who control hundreds of channels of programming -- almost never locally oriented and often owned in part by the cable operators themselves -- to stymie broadcasters' efforts to add, usually for part of the broadcast day, four or five new program services within the same 3 MHz digital (cable) channel that accommodates their HDTV programming.

Cable stripping of free multicast services also constitutes signal degradation of the most invasive sort. Existing provisions of the Act and the Commission's rules prohibit cable from degrading broadcasters' analog services, but the Commission will apparently refuse to apply this principle to broadcasting's digital operations.

Moreover, with no carriage protection for their multicast services, broadcasters will concentrate on providing full HDTV service most or all of the time, thus leaving cable systems with little or no additional spectrum, after all. Yet, cable argues that it is the burden of carrying the extra multicast programming that would make a multicast carriage requirement unconstitutional. But if allowing cable to strip broadcasters' multicast programming in favor of its own pay service, including data and telephony, would result in no additional spectrum for cable to use, where is the burden? The only real effect of the Commission's denial of multicast carriage rights will be to abet cable systems' anticompetitive strategies and impact, deprive the public of new *free* and often *local* services, and jeopardize even existing broadcast operations that need to adapt to the new digital, multicast environment.

The Commission's intended ruling also runs squarely into the teeth of the Supreme Court's decision in *Turner II*, which confirmed that broadcasting need not be in its "death throes" to justify protection against cable's potential anticompetitive practices and that the "economic health" of the public's *free* broadcast service, not its mere survival, is sufficient basis for carriage requirements. The carriage decisions the Commission is apparently poised to make -- unnecessarily because they are unlikely to take effect for five years -- would also convert into a self-fulfilling prophecy the desire of the elitists to drive all Americans to total reliance on *pay* television.

Respectfully submitted,

Jonathan D. Blake /axx
Jonathan D. Blake
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
202-662-6000

*Counsel to the CBS Television Network
Affiliates Association and the
NBC Television Affiliates*

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Wade H. Hargrove /axx
Wade H. Hargrove
Mark J. Prak
BROOKS, PIERCE, McLENDON, HUMPHREY
& LEONARD, L.L.P.
P.O. Box 1800
Raleigh, North Carolina 27602
919-834-9216

*Counsel to the ABC Television Affiliates
Association*